



Department of Energy
Chicago Operations Office
9800 South Cass Avenue
Argonne, Illinois 60439

November 1, 2000

Mr. Jeffrey M. Senger
Deputy Senior Counsel for Dispute Resolution
United States Department of Justice
950 Pennsylvania Avenue NW
Room 4328
Washington, D.C. 20530

Dear Mr. Senger:

SUBJECT: DRAFT DOCUMENT "CONFIDENTIALITY IN FEDERAL ALTERNATIVE DISPUTE RESOLUTION (ADR) PROGRAMS"

The Legal Services Group of the U.S. Department of Energy Chicago Operations Office has reviewed the subject document and is providing the following comments and suggestions for your consideration.

Section-by-Section Analysis

Terminology. Many sections use the broad, general term "communication" when the ADR Act covers only two narrow types of communication. As explained in the Q/A, the ADR Act addresses "dispute resolution communications," and "communications provided to the neutral in confidence." Using the short form "communications" is not appropriate, except as a generic reference to both types of ADR Act-protected communications. When the ADR Act refers specifically to "dispute resolution communications," the guidance should as well. See, e.g., Section 574(a)(1), Section 574(a)(2), Section 574(a)(3), Section 574(b), Section 574(b)(1), Section 574(b)(2), Section 574(b)(3), Section 574(b)(4) Section 574(b)(5).

Section 574(a)(4). Unless there is legislative history to the contrary, it appears clear from the punctuation and paragraphing in the Lawyers' Edition of the United States Code Service that the condition regarding "magnitude" applies only to 5 USC 574(a)(4)(C), not to all three limited situations.

Section 574(b)(5). Taking into consideration how Section 574(a)(4) is set forth in the Lawyers' Edition of the United States Code Service, and the fact that again in this section, Congress inserted a "comma" after "health and safety" rather than a "period," the condition regarding "magnitude" should only apply to 5 USC 574(b)(5)(C), not to all three exceptions.

Section 574(b)(7)1). The Statute actually says "all parties", not "everyone". Everyone would include non-parties. The extension from "parties" to "everyone" is not supported by a plain reading of the statute.

Section 574(b)(7)2). The ADR Act does not define "confidential" or "confidentiality." In fact, it nowhere refers to "confidential communications" or "confidential information." We suspect that

the focus on “disclosure” and the two specific types of communications (e.g., through the definition and use of the terms “in confidence” and “dispute resolution communication”) was intentional, and suggest that the guidance should be as precise.

Section 574(b)(7)(2) and 3). The Statute actually uses the phrase “generated by.” Section 574(b)(7)(3) would not be necessary except for the substitution of the less restrictive phrase “coming from” for “generated by” in Section 574(b)(7)(2).

Section 574(c). Change “and” to “or”, consistent with the Act.

Section 574(d)(2)(3). The antecedent for the pronoun “they” in this sentence would be expected to be “Dispute resolution communications,” but rather is “alternative confidentiality procedures.” To correct the perception that *all* dispute resolution communications do not qualify if the procedures provide for less disclosure, the sentence could be revised to read: “Dispute resolution communications *protected from disclosure* by alternative confidentiality procedures that provide for less disclosure than the ADR Act do not qualify for protection from disclosure under FOIA section 552(b)(3) *if they would not be protected from disclosure under the ADR Act,*” or more simply, “If alternative confidentiality procedures provide for less disclosure than the ADR Act, only dispute resolution communications exempt from disclosure under the ADR Act are exempt from disclosure under FOIA section 552(b)(3).”

Questions & Answers

Additional examples would be useful in the following sections:

Q/A #6 (provide an example of a party who is not named in the legal proceeding but will be affected significantly by the outcome of the proceeding).

Q/A #11C (provide an example of a statute or an example under FOIA when a communication would not exempt from disclosure).

Q/A #11D.

Q/A #23.

Q/A #24.

Q/A #1. As commented in the section-by-section analysis, above, the ADR Act never uses the terminology “confidential communications.” Rather, it addresses specific ADR-related kinds of communications and limits the discussion of “confidentiality protections” to “voluntary disclosure” and “disclosure compelled through discovery or compulsory processes.” The Question should likewise avoid characterizing communications with the adjective “confidential,” e.g., by asking, “What communications are potentially subject to confidentiality protection under the ADR Act?” [See Q/A # 10 and Q/A # 11 as examples of appropriate questions.]

Q/A #3. The existence of exceptions is noted in Q/A #2 for “communications provided in confidence by a party to a neutral”; likewise, the existence of exceptions should be noted in Q/A

#3 for "communications provided to the neutral in confidence." A cross reference to the exceptions in Section 574(a)(1) and 574(a)(4) would be appropriate.

Q/A #5. Section 573 provides much more information on neutrals, and should be captured here. In addition to aiding the parties during a dispute resolution process, the concept of "neutral" presumes (1) absence of conflicts of interest, and (2) serving "at will" and acceptable to the parties.

Q/A #7. "Diclosure" should be "Disclosure".

Q/A #8. "In general" should be explained as meaning the existence of exceptions. A cross reference to Q/A's discussing the exceptions would be sufficient.

Q/A #9. "Who is a non-party participant in a dispute resolution proceeding" might be an appropriate question to address separately. Also, replace "such a the communication" [sic] with "a dispute resolution communication provided by a non-party participant."

Q/A #11. This Question is overbroad. There are *many* communications that are not protected by the ADR Act. If this Question is just intended to serve as a springboard for the exceptions to the ADR Act's disclosure protections, then the Question should be, "Under What Circumstances May ADR Act-protected Communications Be Disclosed?"

Q/A #11A. Being "not protected by the ADR Act" is not the same as "may disclose". Being "not protected" means that a party may voluntarily disclose or "may be compelled to disclose through discovery or compulsory process." The Answer also should distinguish "dispute resolution communications" from "communications provided in confidence to the neutral." Section 574(b) of the ADR Act, which is the basis for this Q/A, only addresses the former.

Q/A #11B. The answer/examples should explain how a dispute resolution communication becomes "already public" if, until public, disclosure is prohibited. Is this essentially the same as saying that if one person violates the confidentiality protections, they no longer apply?

Q/A #11C. The phrase "a protected dispute resolution communication which is between a neutral and a party" should be replaced with the phrase "a communication provided in confidence by a party to a neutral", consistent with Q/A #1B and Q/A #3.

Q/A #11D. Unless the legislative history proves conclusively otherwise, the proper legal interpretation of these sections is that the "sufficient magnitude" condition only applies to the third limited situation, not all three.

Q/A #11F. Again, there are exceptions to the first sentence, that should be revealed. Also, The cited section doesn't refer to "everyone," but merely requires that the information be available to all other parties. Finally, there is one prohibition against a party disclosing communications available to the other parties and that is communications generated by the neutral.

Q/A #12. The word "generated" should be inserted before "by". Also, "confidential" should be replaced by "subject to the disclosure protections of the ADR Act".

Q/A #13. Replace "Can confidentiality attach to communications..." with "Do the ADR Act disclosure protections cover dispute resolution communications...?"

Q/A #14. What if the evidence is a "dispute resolution communication" or a "communication provided in confidence to the neutral"? How is "evidence" defined? Written and verbal communications can be "evidence." Restating the statutory language is not helpful.

Q/A #15. This Answer is difficult to understand. First, it should explain why a federal agency's exercise of its statutory authority is not a "compulsory process." Also, answers and recommendations should avoid using "legalese" and Government-speak, such as, "Agency ADR programs should *enter into dialogue* with potential requesting entities so that each may be *educated about their respective missions*." It may help to clarify that the potentially requesting entity is a requester of communications that took place as part of an agency's dispute resolution proceeding.

Q/A #18. As previously commented, the Question should, like the ADR Act, address "dispute resolution communications" and/or "communication provided in confidence to the neutral," not "confidential communications."

Q/A #19. The Question and Answer should, like the ADR Act, address "dispute resolution communications" and/or "communication provided in confidence to the neutral", not "confidential communications" or "confidential information." With respect to the answer, what is the source for the definition of "demand for disclosure?" More importantly, the requirement that the neutral notify the parties of a demand for disclosure is only triggered if the demand for disclosure is "regarding a dispute resolution communication." Since it is reasonable to assume that a dispute resolution communication is subject to ADR Act confidentiality protections, a belief on the part of the neutral that there is no basis for refusing to disclose the communication would seem to be counter-intuitive. An example should be given to support the reasonableness of a neutral's belief that the communication is not protected.

Q/A #20. One of the most important tasks this document could perform would be to reconcile the apparent inconsistency between sections 574(a) and 574(e). The premise of 574(a) is that the neutral may not be compelled to disclose "dispute resolution communications" and/or "communication provided in confidence to the neutral," even in the face of a "demand for disclosure" except in certain limited circumstances. This would seem to create a presumption in favor of non-disclosure, and would put the burden on the party initiating the request for disclosure to demonstrate the existence of an exemption. It is therefore difficult to reconcile this requirement that the neutral notify the party, and that the party make arrangements to defend non-disclosure. The neutral would seem to have a better understanding of the exemptions, and a superior ability to defend non-disclosure. Notice would only seem to provide the parties an opportunity to waive their right to non-disclosure.

Q/A #22. The answer should also clarify whether a federal employee who serves as a neutral (either as a main element of his or her job, or as a collateral duty) can be compelled to make a disclosure under any one of the named acts if another Government agency or supervisors/officials in the neutral's home agency request the information. Is a federal employee neutral subject to disciplinary action for refusing to divulge information to the Government if such

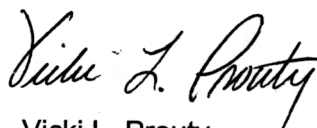
disclosure would violate the requirements the of ADR Act? Of neutral ethics? In other words, is a private sector neutral better able to keep communications confidential than a federal employee neutral?

Q/A #23. It is recommended that a sentence be added in the second paragraph tying the first sentence to the second, such as, "Under FOIA, oral communications are not records." Also, the answer should address the issue of when and if notes made by a neutral or party, if federal employees, could be considered agency records which might then be subject to FOIA.

Q/A #24. As indicated in the comment on the paraphrasing of 574(d)(2) in the section-by-section analysis, it would be an anomalous result if agreeing to more protective alternative confidentiality procedures cost the parties their section 552(b)(3) FOIA exemption. Contrary to the second sentence in the second paragraph of the answer, if the [section 574(d) "alternative confidentiality procedures"] provide for less disclosure, only those dispute resolution communications that would not be protected under the ADR Act are subject to the section 552(b)(3) FOIA exemption. It would be helpful if the Question and Answer focused on the section 552(b)(3) FOIA exemption, and used the section 574(d) terminology "alternative confidentiality procedures" consistently, instead of "agreement" and "contract." Also, the answer requires a plain statement that, "If the parties agree to alternative confidentiality procedures, whether a particular record of dispute resolution communication is protected from disclosure under FOIA 552(b)(3) is determined by the ADR Act or the alternative confidentiality procedures, whichever provides for more disclosure." The complex interplay between alternative confidentiality procedures and FOIA 552(b)(3) could then be simplified with tie-ins to the ADR Act protections as follows: "If the alternative confidentiality procedures provide for the same or more disclosure than provided by the ADR Act, dispute resolution communications would be exempt from disclosure under FOIA section 552(b)(3) to the extent they are protected under the ADR Act. If the alternative confidentiality procedures provide for less disclosure, only dispute resolution communications protected from disclosure under the alternative confidentiality procedures would be exempt from disclosure under FOIA section 552(b)(3)." FOIA exemptions other than 552(b)(3) should be addressed, if at all, separately.

If you wish to discuss these comments and suggestions, please feel free to contact me at 630-252-2244, or by e-mail at vicki.prouty@ch.doe.gov.

Sincerely,



Vicki L. Prouty
Assistant Chief Counsel

cc: Phyllis Hanfling, Director
DOE Office of Dispute Resolution